

FEDERAL MAIL

Before the
Federal Communications Commission
Washington, D.C. 20554

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DISC

In the matter of)	
)	
Stale or Moot Docketed Proceedings)	
)	
1993 Annual Access Tariff Filings Phase I)	CC Docket No. <u>93-193</u>
)	
1994 Annual Access Tariff Filings)	CC Docket No. 94-65
)	
AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464)	CC Docket No. 93-193
Phase II)	
)	
Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690)	CC Docket No. 94-157
)	
NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328)	

ORDER**Adopted: January 14, 2004****Released: February 6, 2004**

By the Commission: Commissioner Martin dissenting and issuing a separate statement.

I. INTRODUCTION

1. Verizon has sought reconsideration of an order in which the Wireline Competition Bureau ("the Bureau") corrected an unintentional clerical error that had made it appear that the Commission had terminated a tariff investigation without making the required determinations of the lawfulness of the subject tariff. Verizon has failed to persuade us that we should reverse the Bureau and let stand the previous, technical mistake. Accordingly, we deny Verizon's petition.

II. BACKGROUND**A. Procedural History**

2. On June 30, 1995, the Bureau designated for investigation issues in three related tariff proceedings involving the accounting treatment, under price cap regulation, of "other post-retirement employee benefits," or "OPEBs."¹ In its *Combined OPEB Investigations Order*, the Bureau designated CC

¹ 1993 Annual Access Tariff Filings, CC Docket No. 93-193, 1994 Annual Access Tariff Filings, CC Docket No. 94-65, AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, CC Docket No. 93-193, Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690, CC Docket No. 94-157, Order Designating Issues for Investigation, 10 FCC Rcd 11804 (Com. Car. Bur. 1995) (*Combined OPEB Investigations Order*). The present Wireline Competition Bureau was known as the Common Carrier Bureau until 2002.

Docket No. 94-157 as the docket number for the combined investigation of these issues.² The local exchange carriers (LECs) filed direct cases and their customers filed responsive pleadings.

3. On December 21, 2001, as a housekeeping matter, the Commission adopted a two paragraph order (*Termination Order*) that purported to terminate over 100 docketed proceedings listed in an appendix. The Commission's order stated that "[n]one of the listed dockets [has] any outstanding issues." It further stated "[t]he matters at issue in these proceedings were resolved by the issuance of final orders that were not subject to judicial review, or if subject to judicial review, were affirmed and the court's mandate was issued."³ Among the dockets listed in the Appendix was CC Docket No. 94-157, even though the tariff investigations the Commission had instituted in that docket had not been concluded by a final order or otherwise. Indeed, the Commission had not issued any order in the consolidated investigations after the filing of the LECs' direct cases.

4. Ten months after the release of the *Termination Order*, AT&T made an *ex parte* presentation in the OPEBs docket.⁴ A short time thereafter, the Bureau discovered that CC Docket 94-157 had been listed in the appendix of the *Termination Order*, even though the Commission had not issued a final order closing the investigation or resolved the outstanding issues in dispute. In the *Erratum Order*, issued thirteen months after the *Termination Order*, the Bureau deleted the inclusion of CC Docket 94-157 from the appendix of the *Termination Order*, explaining that its inclusion had been an inadvertent technical error.⁵

5. The *Erratum Order* also stated that the Commission would investigate two specific issues: (1) the issue B in the *Combined OPEB Investigations Order* (whether LECs may treat as exogenous the SFAS-106 costs they incurred prior to January 1, 1993); and (2) the issues regarding rate base treatment of OPEBs discussed in the *1996 Tariff Order*.⁶ Concerning the first issue, the *Erratum Order* required Verizon to file its direct case; interested parties were directed to file comments on the second issue.⁷ With respect to other OPEB issues under investigation in CC Docket No. 94-157, CC Docket No. 94-65, and CC Docket No. 93-193, the *Erratum Order* requested parties with interest in these

² See *id.* at 11817, para. 32.

³ *Termination of Stale or Moot Docketed Proceedings*, Order, 17 FCC Rcd 1199 (2002) (*Termination Order*).

⁴ We note that AT&T sought judicial review of the *Termination Order*. AT&T claimed that the Commission erroneously had terminated a rulemaking docket unrelated to OPEBs that contained outstanding petitions for reconsideration and judicial review. Subsequently, the Commission staff issued an erratum deleting the reference to the docket identified by AT&T from the appendix of the *Termination Order*, explaining that the docket had been listed inadvertently. *Erratum*, 17 FCC Rcd 4543 (Com.Car.Bur. 2002). That erratum was adopted outside the 30-day period specified by section 1.108 of the Commission's rules, under which the agency may set aside actions on its own motion. See 47 C.F.R. § 1.108. After that erratum was adopted, the court of appeals granted the Commission's motion to dismiss AT&T's petition for judicial review. See *AT&T Corp. v. FCC*, No. 02-1084 (per curiam) (unpublished).

⁵ See *Stale or Moot Docketed Proceedings*, 1993 Annual Access Tariff Filings Phase I, CC Docket No. 93-193, 1994 Annual Access Tariff Filings, CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2*, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1*, Transmittal No. 690, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1*, Transmittal No. 328, Order, Notice and Erratum, 18 FCC Rcd 2550 (WCB 2003) (*Erratum Order*).

⁶ 1996 Annual Access Tariff Filings; *National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates*; *NYNEX Telephone Company Petition to Advance the Effective Date of the 5.3 X-Factor to January 1, 1995*, Transmittal No. 710, Memorandum Opinion and Order, 11 FCC Rcd 7564 (Com. Car. Bur. 1996) (1996 Tariff Order).

⁷ *Erratum Order*, 18 FCC Rcd at 2558-9, para. 23. Verizon filed its direct case and interested parties filed comments as directed in the order.

dockets to inform the Bureau of any issue that remains open.⁸

6. On March 27, 2003, Verizon filed a petition for reconsideration of the *Erratum Order*.⁹ AT&T Corp. (AT&T) and WorldCom, Inc. (WorldCom) jointly filed an opposition to the *Verizon Petition* on April 7, 2003.¹⁰ SBC Communications, Inc. (SBC) filed in support of Verizon on April 14, 2003.¹¹ Verizon filed reply comments on April 17, 2003.¹² In this Order, we treat Verizon's Petition for Reconsideration as an application for review by the Commission. The Commission affirms the Bureau's decision and denies Verizon's petition.

B. Positions of the Parties

7. Central to Verizon's petition for reconsideration is its argument, based on the D.C. Circuit's *Albertson* and *American Methyl* decisions, that the Commission exceeded its authority when it reinstated Docket No. 94-157 after the time for agency reconsideration and judicial review had lapsed.¹³ According to Verizon, the Commission had no authority to correct the error in this case and reinstate the investigation after 60 days.¹⁴ Verizon also analogizes the Commission's error correction authority to that of a district court governed by Rule 60 of the Federal Rules of Civil Procedure (FRCP).¹⁵ Rule 60(a) permits corrections of clerical errors for an indeterminate amount of time, whereas Rule 60(b) permits the correction of errors resulting from "inadvertence, surprise, or excusable neglect" for one year after the entry of a judgment or order.¹⁶ Verizon claims that inclusion of the Docket 94-157 in the *Termination Order* falls within the class of "inadvertent" errors governed by Rule 60(b). Thus, Verizon contends, the time for correction had expired before the Bureau issued the *Erratum Order*.¹⁷ Verizon argues that the errors properly considered under Rule 60(a) "are limited to errors of transcription, copying or calculation" that do not "affect the substantive rights of the parties." Further, Verizon claims that considerations of finality and repose are of special significance in this case and argues generally that it would be prejudiced if the case were reopened.¹⁸ Verizon also claims that section 4(i) of the Communications Act does not provide a basis for reinstatement of the investigation.¹⁹

⁸ *Id.* at 2551, para. 4..

⁹ *Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase I*, CC Docket No. 93-193, *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, *Petition for Reconsideration of Verizon*, filed March 27, 2003 (*Verizon Petition*).

¹⁰ *Opposition of WorldCom, Inc. and AT&T Corp. to Verizon's Petition for Reconsideration*, filed April 7, 2003 (*WorldCom/AT&T Opposition*).

¹¹ *Reply Comments of SBC Communications, Inc. in Support of Verizon's Petition for Reconsideration*, filed April 14, 2003 (*SBC Reply Comments*).

¹² *Reply in Support of Petition for Reconsideration*, filed April 17, 2003 (*Verizon Reply*).

¹³ *Verizon Petition* at 6 (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) (*Albertson*); *American Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984) (*American Methyl*)).

¹⁴ *Verizon Petition* at 3 and 6 (citing 47 C.F.R. § 1.108 and 28 U.S.C. § 2344).

¹⁵ *Verizon Petition* at 5-8.

¹⁶ *See* Fed. R. Civ. P. 60(a) and (b).

¹⁷ Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to William Maher, Chief, Wireline Competition Bureau, FCC, June 11, 2003, at 2.

¹⁸ *Verizon Petition* at 8-13; *Verizon Reply* at 6-9.

¹⁹ *Verizon Petition* at 13; 47 U.S.C. § 154(i).

8. In addition, Verizon claims that, in light of the deadline established in section 204 governing the completion of tariff investigations, the Commission lacks authority to reinstate an investigation that had been finally terminated.²⁰ SBC argues that the Commission lacks the authority to take any action with respect to a tariff investigation after the statutory deadline has passed.²¹ SBC also argues that the Commission has acknowledged that its authority to revisit final actions is limited. SBC cites *Applications of County of San Mateo, California* for the proposition that ministerial errors are limited to actions such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.²²

9. AT&T and Worldcom (the IXC's) maintain that the Commission has broad error correction powers that are not constrained by the Federal Rules of Civil Procedure.²³ The IXC also argue that, even if the Federal Rules were to govern, the error at issue here would fit within the "clerical error" exception set forth in Rule 60(a).²⁴ The IXC's further contend that the Commission has the authority to correct its error, and, because the investigation was erroneously and improperly terminated, its reinstatement does not constitute a new proceeding under section 204.²⁵ Moreover, they argue, the *Termination Order* was not an "order concluding a hearing" within the meaning of section 204(b).²⁶

III. DISCUSSION

A. FCC's Error Correction Authority

10. We hold that the Commission has authority to issue the *Erratum Order* deleting the inadvertent and erroneous citation to CC Docket 97-154 in the appendix of the *Termination Order*. The courts have long recognized that administrative agencies such as the Commission have "inherent power to rectify ministerial mistakes,"²⁷ including unintentional processing errors in administrative decisions. The action taken in the *Erratum Order* is well within the scope of that inherent error correction authority.²⁸

11. The Commission's authority to correct unintentional processing errors is reflected in the Communications Act. Section 4(j) of the Communications Act provides that "[t]he Commission may

²⁰ Verizon Petition at 12.

²¹ See Letter from Michael D. Alarcon, Executive Director, Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, July 10, 2003.

²² See Letter from Gary L. Phillips, General Attorney & Assistant General Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, July 16, 2003 (citing *Applications of County of San Mateo, California*, 16 FCC Rcd 16501, 16503 (2001) (*San Mateo*)).

²³ WorldCom/AT&T Opposition at 9-10.

²⁴ *Id.* at 14-16.

²⁵ *Id.* at 16-19.

²⁶ *Id.* at 18-20.

²⁷ *Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41 (D.C. Cir. 1980). See *City of Long Beach v. DOE*, 754 F.2d 379, 387 (recognizing the power of an administrative agency to correct orders containing inadvertent, ministerial errors). See also *American Trucking Ass'n v. Frisco Transp. Co.*, 359 U.S. 133, 145 (1958) ("The presence of authority in administrative officers and tribunals to correct [inadvertent ministerial] errors has long been recognized.").

²⁸ See *Robert O. Benz*, 13 FCC Rcd 2898, 2900, para. 5 (WTB/CWD, 1998) (*Robert O. Benz*) (A ministerial error that the agency has authority to correct "is defined as an error involving arithmetic functions, clerical errors and any other type of unintentional error.").

conduct its proceedings in such manner as will best conduce . . . to the ends of justice.”²⁹ The Supreme Court held that this language in a cognate statute identical to section 4(j) “authorizes the correction of inadvertent ministerial errors.”³⁰ Although the Commission may not use the error correction authority in section 4(j) “as a guise for changing previous decisions because the wisdom of those decisions appear doubtful,” section 4(j) is a “broad enabling statute” that authorizes the correction of unintentional processing errors such as the one here.³¹ The Commission’s section 4(j) authority is limited by the requirement that its exercise “conduce to the proper dispatch of business and to the ends of justice.”³² There is, however, no temporal limitation on the Commission’s authority to rectify unintentional errors under section 4(j).

12. Additionally, section 4(i) of the Communications Act gives the Commission authority to “perform any and all acts . . . as may be necessary in the execution of its functions.”³³ The D.C. Circuit has characterized section 4(i) as a “necessary and proper clause” that empowers the Commission to take action that is “appropriate and reasonable” to the execution of its statutory responsibilities.³⁴ The Commission has held that section 4(i) authorizes the correction of inadvertent ministerial errors contained in its orders.³⁵ Consistent with that precedent, we find that, in addition to our above-discussed inherent authority, our authority pursuant to sections 4(j) and 4(i) independently authorizes the Commission to take corrective action in this case, as is necessary to promote compliance with sections 202 and 204 of the Communications Act.³⁶

B. *Sua Sponte* Reconsideration Deadline Inapplicable

13. Sections 1.108 and 1.113 of our rules state that the agency may “set aside” administrative actions on its own motion within 30 days.³⁷ While these rules impose a time constraint on the Commission’s authority *sua sponte* to modify an order where the agency subsequently revisits a prior determination and decides that the original decision was injudicious, these rules do not bar the issuance of the *Erratum Order* in this case. The Commission “sets aside” an action within the meaning of sections 1.108 and 1.113 when it deliberately changes course by vacating a decision that it later determines to have been ill-advised. In other words, these rules impose a 30-day time limit on the agency’s authority to revisit a considered, substantive decision about which it later reaches a different conclusion. The staff, in issuing the *Erratum Order*, did not reconsider or “set aside” the *Termination Order*. It did not alter the stated, substantive criteria for determining whether a proceeding should be terminated, nor did it change the manner in which it applied the previously announced standard. It simply corrected an error in the *Termination Order*, making the appendix consistent with its text. Moreover, the Commission has already

²⁹ 47 U.S.C. § 154(j).

³⁰ *American Trucking Ass’n v. Frisco Transp. Co.*, 358 U.S. 133 at 145 (discussing Interstate Commerce Act, § 17(3), 49 U.S.C. § 17(3)).

³¹ *Id.* at 145, 146.

³² 47 U.S.C. § 154(j).

³³ 47 U.S.C. § 154(i).

³⁴ *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1107, 1108 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).

³⁵ *E.g., Mobile UHF, Inc.*, 16 FCC Rcd 22945 (2001) (*Mobile UHF*); *Robert O. Benz*, 13 FCC Rcd at 2900, 2901, paras. 5, 8.

³⁶ 47 U.S.C. §§ 202 and 204.

³⁷ 47 C.F.R. §§ 1.108, 1.113. Rule 1.108 authorizes the Commission “on its own motion [to] set aside any action made or taken by it within 30 days from the date of public notice of such action.” 47 C.F.R. § 1.108. Rule 1.113 provides similar authority to the staff to set aside actions they have taken pursuant to delegated authority.

determined that it is not acting pursuant to sections 1.108 and 1.13 where the Commission “corrects clerical or administrative errors that underlie or occur in the process of taking an action.”³⁸ We find that the erroneous reference to CC Docket No. 94-157 in the appendix of the *Termination Order* is the type of unintentional, processing error to which sections 1.108 and 1.113 and the associated time limits do not apply.

14. As the *Erratum Order* correctly pointed out, the Commission “never intended” to terminate CC Docket No. 94-157.³⁹ The Commission adopted the *Termination Order* solely as a housekeeping measure to clear Commission records of proceedings that the agency already had concluded in earlier administrative actions. When it issued the *Termination Order*, the Commission indicated no intent to change the substantive status of any administrative proceeding, including CC Docket No. 94-157. Indeed, the text of the *Termination Order* explicitly states that the dockets listed in the appendix as terminated had no “outstanding issues” and already had been “resolved by the issuance of final orders.”⁴⁰ That description is wholly inapplicable to CC Docket 94-157 – a docket that indisputably had “outstanding issues” that had not been “resolved by the issuance of [a] final order[.]”⁴¹ Contrary to Verizon’s assertion, the Commission did not make a “conscious judgment” to include CC Docket No. 94-157 in the appendix of the *Termination Order*.⁴² While we cannot determine exactly how the error occurred, the text of the *Termination Order* makes clear that the Commission’s intent was to terminate only those dockets without outstanding issues that were resolved by the issuance of final orders. Thus, it did not intend to terminate pending tariff investigations, such as CC Docket No. 94-157. The inclusion of CC Docket No. 94-157 in the list of over 100 other dockets in the appendix was a wholly unintentional, processing error. The Commission’s records conclusively established that, when it adopted the *Termination Order*, the tariff investigation was still pending before the agency.

15. Given the unintentional nature of the error, the period for issuing a *sua sponte* reconsideration does not apply. The Commission has made clear that “upon learning of an inadvertent ministerial processing error, [it] may correct its error, even beyond the reconsideration period.”⁴³ Both the Commission and its staff affirmatively have exercised that authority in appropriate cases.⁴⁴ Indeed, in

³⁸ *San Mateo*, 16 FCC Rcd at 16503. See *Mobile UHF*, 16 FCC Rcd at 22946 (“The Commission, upon learning of an inadvertent ministerial processing error, may correct its error, even beyond the [thirty-day] reconsideration period.”).

³⁹ *Erratum Order*, 18 FCC Rcd 2550 (2003).

⁴⁰ *Termination Order*, 17 FCC Rcd 1199 (2002).

⁴¹ *Id.*

⁴² Verizon Reply at 8. Noting that the caption of the *Termination Order* is “In the Matter of Stale or Moot Docketed Proceedings,” SBC states that the Commission “may have intended” in the *Termination Order* to terminate proceedings that are stale in addition to those that had been resolved by the issuance of final orders. SBC Reply at 2. SBC’s claim is not persuasive, as well as being wholly speculative. Whatever the caption may have read, the Commission’s intent, as clearly reflected in the text of the *Termination Order*, was to terminate only those dockets without outstanding issues that were resolved by the issuance of final orders. SBC is further mistaken in arguing that the staff’s earlier erratum deleting two other mistaken citations in the appendix shows that the agency intentionally included CC Docket No. 94-157 in the list of terminated dockets. The staff did not take corrective action deleting the reference to CC Docket No. 94-157 in the appendix of the *Termination Order* when it issued the first erratum because it was unaware at that time that CC Docket No. 94-157 had been mistakenly listed in the appendix.

⁴³ *Mobile UHF, Inc.* 16 FCC Rcd at 22945.

⁴⁴ The Commission’s staff has construed the Commission’s error-correction authority broadly. See *Robert O. Benz*; *Lawrence Behr*, 17 FCC Rcd 19025 (WTB/CWD 2002). For example, in *Robert O. Benz* the Commercial Wireless Division set aside a subsequent mobile radio service authorization in favor of the prior license holder whose authority had been deleted from the division’s records inadvertently. 13 FCC Rcd at 2900, paras. 5-7. The record was corrected, and the subsequent authorization rescinded. *Id.* Similarly, in *Lawrence Behr*, the same division

(continued....)

2002 the Commission's staff on delegated authority exercised the agency's error-correction authority in a situation identical to this one by deleting two other incorrect citations inadvertently included in the appendix of the *Termination Order*.⁴⁵ That earlier *Erratum*, like the one here, was issued outside the 30-day period set forth in section 1.108.

16. SBC's argument that the *Erratum Order* is at odds with the Commission's decision in *San Mateo* is unavailing. In *San Mateo*, the Commission expressly recognized that its authority to correct inadvertent, ministerial, processing errors is not subject to any specific time constraints.⁴⁶ The Commission concluded, however, that the specific corrective action the staff had taken in that case, i.e., the setting aside of a modification application, was not a "ministerial or clerical error."⁴⁷ The staff in *San Mateo* set aside its earlier decision to grant a modification application because the grant was made without regard to the pendency of a prior competing application.⁴⁸ In other words, the staff in *San Mateo* had intentionally granted the application but subsequently determined that its grant was ill-advised. In contrast, the staff in this case merely corrected an unintentional, processing error; it did not set aside an earlier action that it later determined to be wrong.

C. Reconsideration and Judicial Review Deadline Inapplicable

17. We also reject Verizon's argument, based on *Albertson* and *American Methyl*, that the Commission's authority to correct its clerical mistake expired with the time for seeking agency reconsideration and judicial review of the *Termination Order*. In *Albertson*, the court held that an applicant challenging a permit for construction was denied a reasonable opportunity to show cause. In so doing, the court rejected the Commission's claim that it lacked authority to reconsider the applicant's claim as inconsistent with the Commission's authority under its rules "on its own motion [to] set aside any action made or taken by it within 20 days."⁴⁹ In no way did the court establish the time for seeking judicial review as the outer limit of the Commission's authority to reconsider a prior decision.⁵⁰ To the contrary, the court of appeals held merely that a timely request to reconsider earlier agency action tolled the period for seeking judicial review. More significantly, *Albertson* addresses the situation where the

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reinstated an application for a Phase I 200 MHz license that had been "misplaced," allowing another applicant to be granted a license for the same frequency in the same geographical area four years after the award of the original license. 13 FCC Rcd at 19026. See also *Application of Robert Fetterman d/b/a RF Communications*, 16 FCC Rcd 8221 (2001) (*Robert Fetterman*) (staff corrected inadvertent omission of one station from a construction permit 13 years afterwards).

⁴⁵ *Erratum*, 17 FCC Rcd 4543 (Com. Car. Bur. 2002). The agency in other cases has exercised its error-correction authority to rectify the inadvertent inclusion of incorrect references in administrative orders. See *Application of DCT Communications, Inc.*, 15 FCC Rcd 15543 (WTB/PSWD 2000) (correction of a license to delete the inadvertent inclusion of three channels).

⁴⁶ 16 FCC Rcd at 16503, para. 8.

⁴⁷ *Id.* at 16504, para. 11.

⁴⁸ *Id.* at 16502, para. 4.

⁴⁹ *Albertson*, 182 F.2d at 399 (citing F.C.C. Rule 1.726(c)).

⁵⁰ See *Albertson*. Verizon appears to assert that the Hobbs Act in some way operates as a substantive constraint on the agency's ability to correct the error in this case. See Verizon Reply at 3-4 (citing 28 U.S.C. § 2344). We disagree. The 60-day Hobbs Act period sets forth the time period within which a party may seek judicial review of certain types of Commission decisions in the courts of appeals. No party currently seeks judicial review of the *Termination Order*, and thus this case does not arguably implicate issues arising from the concurrent jurisdiction of the courts and agencies, i.e., the scope of the Commission's power to correct errors in orders subject to the jurisdiction of the court of appeals. Furthermore, nothing in the Hobbs Act limits the scope of the Commission's error-correction authority under sections 4(i) and 4(j) of the Communications Act.

agency reconsiders a substantive decision; it says nothing about the Commission's power to do as it has done here and rectify an unintentional processing error. Moreover, in *American Methyl*, the D.C. Circuit declined to address "in the abstract" whether agencies have "further inherent or implicit authority" that permit them to correct errors outside the judicial review period.⁵¹

D. Rule 60(a) Inapplicable

18. Verizon also argues that the Commission lacks authority to delete the incorrect reference to CC Docket No. 94-157 in the *Erratum* because the agency's action affects the LEC's substantive rights and it is not a transcription or clerical error that may be corrected under Rule 60(a). According to Verizon, the Commission's error-correction powers "cannot logically be expanded beyond the reach of Rule 60(a)."⁵² For three reasons we find Verizon's argument unpersuasive. First, as Verizon itself admits, the Federal Rules of Civil Procedure govern the judicial proceedings of the federal district courts, not the administrative proceedings of the FCC.⁵³ We disagree with Verizon that Rule 60 in some undefined way constrains the Commission's error-correction authority. As the Supreme Court has stated, Congress invested administrative agencies, such as the FCC, "with power far exceeding and different from" that given to federal courts and "[t]hese differences . . . preclude wholesale transplantation of the rules of [judicial] procedure to [administrative proceedings]."⁵⁴ Indeed, the Supreme Court has held that the "broad delegation" of authority in section 4(j) empowers the Commission to establish its "own rules of procedure" that are "adapted to the peculiarities of the industry and the tasks of the agency."⁵⁵ Verizon's claim that the Commission's authority to correct inadvertent errors under section 4(j) is absolutely constrained by the limitations in Rule 60 misreads applicable precedent and imposes unwarranted limits on the Commission's statutory authority.⁵⁶

19. Second, even if Rule 60 limited the scope of the Commission's error-correction authority – and it does not – the error in this case is one that would be correctable under Rule 60(a). Rule 60(a) permits a district court to correct "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission."⁵⁷ In other words, Rule 60(a) permits the correction of "what is erroneous because the thing spoken, written or recorded is not what the person intended to speak, write or record."⁵⁸ As shown above, that is precisely the type of mistake corrected by the *Erratum Order*, where the contents of the appendix did not originally match the criteria announced in the body of the order.

20. Third, we find unpersuasive Verizon's argument that the agency lacked authority to take

⁵¹ See generally *American Methyl*, 749 F.2d at 835.

⁵² Verizon Reply at 7.

⁵³ Verizon Reply at 7.

⁵⁴ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-43 (1940) (emphasis added). See also *FCC v. Schreiber*, 381 U.S. 279, 290 (1965); *Albertson*, 182 F.2d at 400-01 ("While the Commission's procedure is not governed by the Federal Rules, 'administrative procedure is, and should be, simpler, less formal and less technical than judicial procedure.'" (citation omitted)).

⁵⁵ *FCC v. Schreiber*, 381 U.S. at 290.

⁵⁶ We note, however, that, in its discretion, the Commission can and does look to the Federal Rules of Civil Procedure for guidance. See, e.g., *APCC Services, Inc. v. TS Interactive, Inc.*, 17 FCC Rcd 25523, 25526, ¶ 7 (Enf. Bur. 2002) (relying on the Federal Rules of Civil Procedure for guidance); *Premier Network Services, Inc. v. Southwestern Bell Tel. Co.*, 18 FCC Rcd 11474, 11475 ¶ 4 (Enf. Bur., MDRD 2003) (same).

⁵⁷ Fed. R. Civ. P. 60(a).

⁵⁸ *In re Craddock*, 149 F.3d 1249, 1254 n.4 (10th Cir. 1998).

corrective action in this case because the action affects Verizon's substantive rights. An agency's authority to correct an inadvertent, processing error does not depend upon whether the corrective action affects the party's substantive rights. Indeed, agencies have corrected inadvertent, processing errors that modify operative terms in licenses, certificates of public convenience and necessity, and construction permits.⁵⁹ Certainly, these corrections affected substantive rights – if substantive rights were not affected, parties would have little reason to expend resources to litigate such corrections, and we would thus lack the precedent that informs our decision today.

E. Section 204

21. Verizon further contends that, once the *Termination Order* became final, the effect of the initial suspension order and the associated accounting order, which would have permitted the Commission to order refunds, was nullified as well. Thus, Verizon argues, the Commission is without authority to continue the investigation pursuant to section 204. We disagree with Verizon that the incorrect reference to CC Docket No. 94-157 in the appendix of the *Termination Order* had the effect of substantively terminating the OPEBs investigation. The text of the *Termination Order* unambiguously describes the types of proceedings that the Commission intended to include in the order. CC Docket No. 97-157, as explained above, simply does not meet any of the criteria, and it was inadvertently included in the appendix to the order in error. The *Erratum Order* clarified that the Commission in the *Termination Order* never intended to terminate CC Docket No. 94-157. The *Erratum Order* thus clarified that the *Termination Order* had not terminated CC Docket No. 94-157 and that the investigation remained pending. Thus, neither the *Termination Order* nor the *Erratum Order* changed the status of CC Docket No. 94-157. The *Termination Order* did not affect CC Docket No. 94-157 and the *Erratum Order* merely corrected an unintentional processing error.

22. We also find that the *Termination Order* is not “an order concluding the hearing” within the meaning of section 204(b). Pursuant to section 204, the Commission must either make an affirmative finding that the tariff is either lawful or unlawful, or else determine that it has reconsidered the grounds upon which suspension was ordered and revoke the suspension.⁶⁰ The *Termination Order* does not satisfy either of these requirements. Thus, it cannot be considered to be a substantive decision effectively terminating the investigation.⁶¹

23. With respect to the OPEBs docket itself, it is unclear exactly what the *Termination Order*

⁵⁹ See, e.g., *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133 (agency has authority to modify certificates of public convenience and necessity containing inadvertent errors); *Howard Sober v. ICC*, 628 F.2d 36 (agency has authority to place a restriction on a certificate of public convenience and necessity that had been omitted by a ministerial mistake); *Mobile UHF*, 16 FCC Rcd 22945 (Commission has authority to reinstate a license in correcting an inadvertent processing error); *Robert Fetterman*, 16 FCC Rcd 8221 (Commission has authority to modify a construction permit containing inadvertent errors).

⁶⁰ See, *MCI v. FCC*, 917 F.2d 30, 41-42 (D.C. Cir. 1990).

⁶¹ We reject the argument made by SBC that the Commission lacks authority to proceed with the investigation because section 204(a)(2)(4) requires the Commission to issue an order concluding an investigation within a prescribed time period and that the Commission failed to act within that statutory time period. Comments of SBC Communications Inc. In Support of Verizon's Petition for Reconsideration at 4-7. It is well-established that an agency's failure to comply with a statutory deadline does not preclude the agency from taking action after that deadline has passed. E.g., *Barnhart v. Peabody Coal Co.*, 123 S. Ct. 748, 754-755 (2003); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). Indeed, the court of appeals in *Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 748 (8th Cir. 1998), specifically upheld the Commission's authority to issue an order in a section 204 tariff investigation many years after the expiration of the statutory deadline. The court of appeals in that case held that “the time constraint imposed by section 204 does not operate as a statute of limitations and that its violation therefore does not end the FCC's authority to act.” *Id.*

would have terminated. The *Termination Order* list three items of information: a docket number, a caption, and a citation to the FCC Record. First, the docket number, CC Docket No. 94-157, includes eight investigations.⁶² Second, the caption listed in the *Termination Order* is incomplete and could refer to either of two orders in the docket. Third, the FCC Record cite listed in the *Termination Order* is the citation for an investigation of Pacific Bell, and not of either Bell Atlantic or NYNEX. The FCC Record citation listed in the *Termination Order* further obfuscates any possible intent because it is a suspension order to an uncompleted investigation rather than a termination order, and concerns only Pacific Bell.⁶³ The ambiguities, and, indeed, contradictions arising from the single cite contained within the Appendix to the *Termination Order* further undermine the argument that that Order had in fact terminated all pending investigations contained within Docket No. 94-157, as Verizon and SBC argue it did.

F. Equitable Considerations

24. Under section 4(j), we must consider whether the correction of this the erroneous reference to CC Docket No. 94-157 in the appendix of the *Termination Order* error "will best conduce to the proper dispatch of business and to the ends of justice."⁶⁴ As between the parties, we believe that the balance of the equities favors correction of the inadvertent processing error. The Commission's error, if uncorrected, could cause substantial injury to the interexchange carriers. In suspending the tariffs in the first place, the Bureau determined that a substantial question existed as to their reasonableness. In the wake of that determination, terminating the OPEB investigations denies these carriers the right to a determination of the lawfulness of the OPEB tariffs and the possible refund of unlawful charges. Moreover, the method by which the Commission purportedly terminated the investigation arguably did not give the interexchange carriers fair notice of the termination. There was no reference to CC Docket No. 94-157 either by name or number in the caption of the *Termination Order*. Furthermore, the text of that order states explicitly that it did not include proceedings, such as CC Docket No. 94-157, that had not been terminated by the issuance of a final order. The only reference to the tariff investigation is buried in a lengthy appendix.

25. Although Verizon argues that there must be finality to the Commission's actions and that thirteen months exceeds any reasonable time to correct errors affecting the parties' substantive rights,

⁶² *Pacific Bell Revisions to Tariff F.C.C. No. 128, Transmittal No. 1911*, CC Docket No. 94-157, Order, 12 FCC Rcd 18724 (1997); *NYNEX Telephone Companies, Transmittal Nos. 435, 442, and 447, New York Telephone Company Transmittal Nos. 1164 and 1172, Tariff F.C.C. No. 1*, CC Docket No. 94-147, Order, 12 FCC Rcd 2355 (1997); *1995 Annual Access Tariff Filing of the NYNEX Telephone Companies and Pacific Bell*, CC Docket No. 94-157, Memorandum Opinion and Order on Reconsideration; Order Suspending and Investigating Rates, 10 FCC Rcd 10860 (1995); *1993 Annual Access Tariff Filings Phase I*, CC Docket No. 93-193, *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, *AT&T Communications, Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462 and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, Order Designating Issues for Investigation, 10 FCC Rcd 11804 (1995); *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 374*, CC Docket No. 94-157, Memorandum Opinion and Order Suspending Rates, 10 FCC Rcd 8689 (1995); *Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1773, US West Tariff F.C.C. No. 5, Transmittal No. 584*, CC Docket No. 94-157, Memorandum Opinion and Order Suspending Rates, 10 FCC Rcd 6038 (1995); *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 747*, CC Docket Nos. 94-139 and 94-157, Memorandum Opinion and Order Suspending Rates, 10 FCC Rcd 5027 (1995); *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690, NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328, Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1738, US West Communications Transmittal No. 550*, CC Docket No. 94-157, Memorandum Opinion and Order, 10 FCC Rcd 1594 (1994).

⁶³ See *Termination Order*, 17 FCC Rcd at 1201, Appendix; *Pacific Bell, Revisions to Tariff F.C.C. No. 128, Transmittal No. 1911*, CC Docket No. 94-157, Order, 12 FCC Rcd 18724 (Com.Car.Bur./CPD 1997).

⁶⁴ 47 U.S.C. § 154(j).

these considerations do not overcome the countervailing equities of the interexchange carriers. While thirteen months is admittedly a long period of time, we cannot find that Verizon suffered unreasonable prejudice or even inconvenience as a result of this delay. Verizon's reliance interest is attenuated because the text of the *Termination Order* explicitly describes the terminated proceedings as dockets without outstanding issues that already had been concluded with the issuance of final orders. As noted above, when the Commission issued its *Termination Order*, the investigation in CC Docket No. 94-157 had not been concluded and a final order had not been issued. Thus, the existence of the error is evident from the text of the *Termination Order* itself, and Verizon cannot credibly claim justifiable reliance. Furthermore, the correction of the erroneous reference to CC Docket No. 94-157 in the appendix leaves Verizon in almost exactly the same position it would have been in if the processing error had not been made. Verizon does not assert that it detrimentally relied on the incorrect reference to CC Docket No. 94-157 in the appendix of the *Termination Order*. For example, Verizon does not claim that it destroyed documents relevant to the tariff investigation because it believed that the *Termination Order* had concluded the tariff investigation.⁶⁵ To establish prejudice, Verizon relies primarily on the departure of employees with knowledge of the case. Verizon does not claim, however, that these departures were in any way connected with the alleged termination of CC Docket No. 94-157 in the *Termination Order*.

26. Although we remain committed to the notions of finality and repose, when balanced against the significant equitable considerations in this case, we believe that the public interest is served by the correction of the inadvertent error in this case. We are mindful that section 4(j) directs the Commission to conduct its proceedings in the way best conducive "to the proper dispatch of business and to the ends of justice."⁶⁶ Where, as here, the agency has made an inadvertent error, the public interest is served by correcting the mistake and proceeding in a manner that "puts the parties in the position they would have been in had the error not been made."⁶⁷

IV. CONCLUSION

27. For the reasons discussed above, Verizon's petition for reconsideration is denied. Accordingly, we will proceed toward a resolution of the tariff investigation.

⁶⁵ Indeed, Verizon fully complied with the Commission's directive to file its direct case and it elected to file comments.

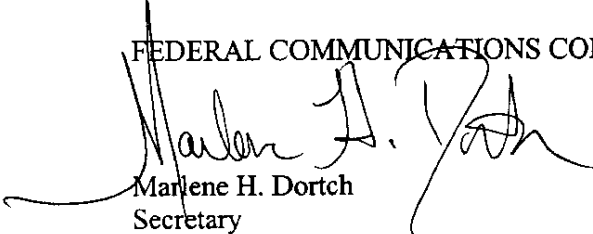
⁶⁶ *Id.*

⁶⁷ *Public Utilities Commission of the State of California v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993).

V. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), and pursuant to sections 0.91, 0.291, and 1.106 of the Commission's rules, 47 C.F.C. §§ 0.91, 0.291, 1.106 that the petition for reconsideration filed by Verizon IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

**DISSENTING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Two years ago, I expressed concern regarding the Commission's process and decision to terminate summarily over 100 docketed proceedings.⁶⁸ In that decision, the Commission dismissed numerous pending items that had "allegedly" become moot solely due to its own failure to act. In particular, I was concerned with a process that dismissed numerous petitions with no official notice to the parties involved.

Today's action revives one of those proceedings-- a 1995 tariff investigation regarding the accounting treatment, under price cap regulation, of "other post-retirement employee benefits," ("OPEBs")—that was terminated in 2001. I continue to have serious concerns with the process in these proceedings. This action reinstitutes a nearly decade old investigation, after the Commission terminated the proceeding over two years ago. I am concerned by the process that allows this termination to be reversed by a bureau-level errata more than thirteen months after the tariff investigation had been terminated.

⁶⁸ Joint Statement of Michael J. Copps and Kevin J. Martin, *Federal-State Joint Board on Universal Service: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order on Reconsideration*, CC Docket Nos. 96-45 & 96-98 (rel. January 29, 2002).